Supreme (1)

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IN THE
Supreme Court of the United States
October Term, 1993

FRANK COSTANZ,

Petitioner,

- v. -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether a Court of Appeals can make a finding that the Government acted in good faith in securing a search warrant for a residence without first addressing the probable cause deter-mination.

LIST OF ALL PARTIES

The original caption in the Court of Appeals included seven co-defendants, Timothy Frazier, Frank Costanz, Vanessa Carter, Shakima Pagan, Antonio Hendricks, Bernard Barnett and Jody Smith. Petitioner believes that the other co-defendants no longer have an interest in the outcome of this petition in this Court.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

FRANK COSTANZ,
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- v. -

UNITED STATES OF AMERICA,
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OPINIONS BELOW

The opinion of the Court of Appeals is unpublished but is reproduced in the appendix to the petition in this case.

JURISDICTION

The judgment of the Court of Appeals was entered on October 19, 1993. A petition for rehearing was denied on December 10, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Background

On December 12, 1990, the Honorable James C. Francis, IV, United States Magistrate Judge for the Southern District of New York, issued an arrest warrant for Frank Costanz. On December 13, 1990, a search warrant

was issued for Costanz's residence, located at 1499 North Avenue, New Rochelle, New York. Recovered at that time inside Costanz's home were, *inter alia*, small amounts of heroin and cocaine; mannitol; lactose; acetone; a heat-sealer; a police scanner; a crinder; a 9-mm. semi-automatic pistol; a .38 caliber Smith and Wesson revolver; a .25 caliber Beretta; three silencers; beepers; a money counter; a scale; and two safes.

The arrest and search warrants were issued based on a complaint and 188-page affidavit sworn to on December 11, 1990 by Special Agent Edward J. Dzialo. [1]

Costanz moved for suppression of the firearms found at his residence, arguing that the affidavit in support of the search warrant did not establish probable cause because there was no basis for concluding or even suggesting a link between the New Rochelle home and narcotics activity, but rather argued that suppression was unwarranted because of the good faith exceptions under *United States v. Leon,* 466 U.S. 897 (1984). On October 17, 1991, the district court, in a two-paragraph opinion devoid of any particularized analysis, denied Costanz's motion and that of three other defendants.

Thereafter, on October 24, 1991, Costanz entered his guilty pleas. During this proceeding, the Government noted that pursuant to a plea agreement dated October 24, 1991, pertaining to Count 17, Costanz had "a right to appeal Judge Edelstein's order denying the motion to suppress evidence recovered on December 13, 1990 inside Costanz's residence at 1499 North Avenue, New Rochelle, New

[1] This affidavit was also used as the basis for Magistrate Francis' issuing of 23 arrest warrants and four search warrants on December 11, 1990.

York". On July 24, 1992, Costanz was sentenced to a term of 121 months' imprisonment on the narcotics charge and a mandatory consecutive 30 year term of imprisonment on the firearms charge.

B. The Decision of the Second Circuit Court of Appeals

The Court of Appeals, without addressing the probable cause argument, found the government acted in good faith under *United States v. Leon,* 468 U.S. 897, 922 (1984).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW RAISES A SIGNIFICANT QUESTION UNDER THE FOURTH AMENDMENT AS TO WHETHER UNDER *UNITED STATES v. LEON,* A REVIEWING COURT CAN MAKE A FINDING THAT THE GOVERNMENT ACTED IN GOOD FAITH IN SECURING A SEARCH WARRANT FOR A RESIDENCE WITHOUT FIRST ADDRESSING THE PROBABLE CAUSE DETERMINATION.

Petitioner contends that the district court should have suppressed the evidence seized from his home located at 1499 North Avenue, New Rochelle, New York. Specifically, he alleges that a close scrutiny of the affidavits submitted in support of the search warrant provided no basis for concluding or even suggesting a link between the

New Rochelle home and narcotics activity. The affidavits of the agents, as shown were totally devoid of particularizing any specific narcotics transactions or any other demonstrable illegal conduct occurring in the New Rochelle home.

The Court of Appeals, without addressing the probable cause argument, found that the Government acted in good faith:

> Because we conclude that the Government acted in good faith in securing and executing the search warrant, we find that the District Court's admission of the evidence was proper and need not address Costanz's probable cause argument. See United States v. Webster, F.2d 1301, 1307 (5th Cir.) cert. denied, 113 S.Ct. 355 (1992).
>
> The good faith exception to the exclusionary rule applies when evidence was seized by officers acting in "objectively reasonable reliance on [the] ... search warrant." United States v. Leon, 468 U.S. 897, 922 (1984). Costanz contends that the good faith exception should not be applied in this case because the affidavits supporting the warrant were so lacking in "indicia of probable cause as to render official belief in its existence entirely unreasonable." Id. at 923. We disagree. Here, the search warrant was narrowly drafted to search for materials likely to be found in Costanz's residence. The detailed affidavits submitted in support of the search warrant clearly established

that Costanz was involved in a narcotics conspiracy, indicated that Costanz used a mobile telephone and beeper to remain in contact with his co-conspirators and included Agent Dzialo's expert opinion that evidence would be located in a drug trafficker's residence. Also, since it is logical that records pertaining to mobile telephones and beepers would be located in one's residence, it cannot be said that the Government's actions were not objectively reasonable.

This conclusion by the Court of Appeals completely ignored facts which indicate that no narcotics activity took place at the residence:

1. That any of the alleged narcotics transactions took place at the house located at 1499 North Avenue, New Rochelle, New York.

2. Any statements by persons intercepted pursuant to the eavesdropping applications, co-conspirators, cooperating witnesses or confidential informants regarding any reference whatsoever to the New Rochelle house.

3. Any allegations that the premises located at 1499 North Avenue was utilized in any manner, including for the storage of narcotics, money, records or documents, in connection with alleged narcotics transactions.

In addition, the Second Circuit has held that the testimony by a law enforcement agent experienced in narcotics investigations that individuals involved in narcotics trafficking are likely to keep incriminating evidence in their residence should be considered in a probable cause determination, this factor alone is not sufficient, absent a link between the home and prior criminal activity. *See United States v. Benevento*, 836 F.2d 60 (2d Cir. 1987), *cert. denied*, 486 U.S. 1043 (1988).

In *United States v. Leon*, 468 U.S.897 (1984), this Court established a good-faith exception to the exclusionary rule. In *Leon*, the Court held that where a search warrant is declared to have been lacking probable cause, suppression is not warranted as long as the evidence was obtained in "objectively reasonable reliance on [the] subsequently invalidated search warrant. "*Id.* at 922. Despite carving out a "good-faith" exception to the exclusionary rule, the *Leon* Court recognized that suppression remains the appropriate remedy "if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." *Id.* at 926.

In carving a judicially crafted exception to the exclusionary rule, the *Leon* Court reasoned that when law enforcement officers have acted in objectively reasonable reliance on a warrant subsequently invalidated because the issuing magistrate made an erroneous probable cause determination, suppression is unlikely to deter future unconstitutional conduct. *Leon*, 468 U.S. at 921. "Suppression of evidence obtained pursuant to a warrant

should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule. "*Id.* However, in making this determination, "[p]olice officers in effecting searches are charged with acknowledge of well-established legal principles as well as an ability to apply the facts of a particular situation to these principles. *United States v. Brown,* 832 F.2d 991, 995 (7th Cir. 1987). "At a minimum, the standard set by the Supreme Court in *Leon* charges law enforcement officers with recognizing the requirement of same kind of connection between the items to be seized and the place or object searched. *United States v. Fairchild*, 774 F.Supp. 1544, 1553 (W.D.Wisc. 1990) (Where, the court found a lack of probable cause to search a car and no objectively reasonable basis for reliance on the warrant).

Here, there is no such connection, either express or implied, between petitioner's residence and contraband. The affidavit contained absolutely no objective facts suggesting that petitioner's house was used as a repository for contraband of any kind, weapons or drug records. There was no one single fact demonstrating that the house was in any way used as a safe-house for the crime-related evidence sought. Consequently, this case does not fall within the "good-faith" exception articulated by the *Leon* Court, and suppression was the only appropriate remedy.

CONCLUSION

For these reasons, a Writ of Certiorari, should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of October, one thousand nine hundred and ninety-three.

PRESENT:

HON. ROGER J. MINER,
HON. FRANK X. ALTIMARI,
Circuit Judges,
HON. JOHN T. ELFVIN*,
District Judge.

UNITED STATES OF AMERICA,
Appellee,

v.

ROBERTS,
Defendant,

TIMOTHY FRAZIER, FRANK COSTANZ, VANESSA CARTER, SHAKIMA PAGAN, ANTONIO HENDRICKS, BERNARD BARNETT AND JUDY SMITH,
Defendants-Appellants.

ORDERS 92-1434, 92-1498, 92-1499, 92-1589

UPON CONSIDERATION of this appeal from judgments of the United States District Court for the Southern District of New York, it is hereby

---

* Honorable John T. Elfvin, Senior United States District Judge for the Western District of New York, sitting by designation.

ORDERED, ADJUDGED, AND DECREED that the judgments of said District Court be and they hereby are affirmed.

Defendant-appellant Frank Costanz appeals from a judgment entered on July 14, 1992 in the United States District Court for the Southern District of (Edelstein, J.), upon a plea of guilty, convicting him of conspiracy to distribute and possess with intent to distribute controlled substances, in violation of 21 U.S.C. § 846, and using or carrying a firearm equipped with a equipped with a silencer during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c). Costanz reserved the right to appeal, with respect to the firearm count only, the District Court's denial of his motion to suppress evidence seized from his residence. Defendants-appellants Antonio Hendricks ("Hendrickson") and Bernard Barnett appeal from judgments of conviction entered in the same court following a jury trial. Hendrickson was convicted of conspiracy to distribute and possess with intent to distribute controlled substances, in violation of 21 U.S.C. § 846, and possession with intent to distribute more than fifty grams of cocaine base, in violation of 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(c), and 18 U.S.C. § 2. Barnett was convicted of conspiracy to distribute and possess with intent to distribute controlled substances, in violation of 21 U.S.C. § 846; possession with intent to distribute more than fifty grams of cocaine base, in violation of 21 U.S.C. §§ 812, 841(a)(1), and 841(b)(1)(A); possession with intent to distribute heroin, in violation of 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(C); using and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c); receiving and possessing a firearm, after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1); and maintaining a place for the purpose of manufacturing and distributing controlled substances, in violation of 21 U.S.C. § 856(a)(1).

Defendant-appellant Judy Smith appeals from a sentence imposed by the same court, upon her plea of guilty, to possession with intent to distribute more than fifty grams of cocaine base, in violation of 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(B), and 18 U.S.C. § 2.

Toward the end of 1989, using an informant named Joseph Pratt, the FBI began an investigation into a narcotics organization controlled by Justine Roberts (the "Justine Roberts Organization"). A court-authorized wiretap intercepted a number of conversations revealing the operations of the Justine Roberts Organization. The FBI also learned that Roberts obtained pure heroin from various sources, including Hendrickson, Barnett and "Mike," who authorities later learned was Costanz.

On December 11, 1990, following further investigations, FBI Special Agent Edward J. Dzialo submitted a 188-page affidavit in support of applications for arrest and search warrants to a United States Magistrate Judge. The affidavit described, inter alia, the involvement of Mike in narcotics trafficking, communications that Mike had with Roberts and an informant, and numerous telephone calls placed to beeper numbers belonging to Mike. The affidavit also included Agent Dzialo's expert opinion that narcotics traffickers maintain books, records and other papers relating to controlled substances in a place to which they have ready access, and keep contraband and records of narcotics transactions and financial transactions relating to narcotics transactions in their residences. The Magistrate Judge thereafter issued arrest warrants for Roberts and twenty-two other people, including Hendrickson, Judy Smith, Barnett and John Doe, a/k/a Mike, as well as search warrants for several locations, including the residences of Roberts, Barnett, Hendrickson and Smith.

The next day, December 12, 1990, FBI agents arrested twenty individuals, including Roberts, Barnett, Hendrickson and Smith. Residential searches were then conducted. On December 13, 1990, agents identified Mike as Frank Costanz and determined that he resided in New Rochelle, NY. Following Costanz's arrest, Agent Dzialo swore out a supplemental affidavit: incorporating by reference his earlier affidavit; setting forth the circumstances leading to the identification of Costanz and the location of his residence; reciting that the wiretaps of Roberts' telephone showed that Mike utilized a mobile telephone; and describing the Government's use of a "clone beeper" to intercept communications to a beeper used by Mike.

The supplemental affidavit was submitted in support of an application for a search warrant for Costanz's residence. The warrant was issued by a Magistrate Judge and authorized the search for evidence of records pertaining to paging devices and the mobile telephone utilized by Costanz; telephone and address books reflecting names, addresses and telephone numbers of coconspirators; monies that were the proceeds of narcotics trafficking; documents reflecting narcotics sales and the disposition of narcotics proceeds; and any other property, documents and things constituting evidence of violations of the federal narcotics laws. The warrant was executed at Costanz's residence by FBI agents on the evening of December 13, 1990. Among the items recovered during the search were telephone bills for a mobile telephone, small amounts of narcotics, firearms and silencers, a money counter and narcotics paraphernalia.

On December 20, 1990, the Government filed a multi-count, multi-defendant indictment. All the defendants, except Barnett and Hendrickson, subsequently

entered guilty pleas. At trial, the Government offered the testimony of Agent Dzialo, Detective Ronald Blackmore (who investigated the Justine Roberts Organization as an undercover agent) and Justine Roberts. The Government introduced recordings obtained from the court-authorized wiretap of Roberts' telephone and much of the physical evidence seized from the residences of various conspirators. Roberts, appearing pursuant to a cooperation agreement entered into with the Government, testified about the scope and operations of the Justine Roberts Organization, and about the roles that Hendrickson and Barnett played in that organization. On December 6, 1991, a jury convicted Hendrickson and Barnett on all counts of a seven-count superseding indictment.

Costanz contends that the District Court erred in denying his motion to suppress the evidence seized during the search of his residence, alleging that the affidavits in support of the search warrant failed to make a showing of probable cause. Because we conclude that the Government acted in good faith in securing and executing the search warrant, we find that the District Court's admission of the evidence was proper and need not address Costanz's probable cause argument. *See United States v. Webster*, 960 F.2d 1301, 1307 (5th Cir.), *cert. denied*, 113 S.Ct. 355 (1992).

The good faith exception to the exclusionary rule applies when evidence was seized by officers acting in "objectively reasonable reliance on [the] . . . search warrant." *United States v. Leon*, 468 U.S. 897, 922 (1984). Costanz contends that the good faith exception should not be applied in this case because the affidavits supporting the warrant were so lacking in "indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id.* at 923. We disagree. Here, the search warrant was

narrowly drafted to search for materials likely to be found in Costanz's residence. The detailed affidavits submitted in support of the search warrant clearly established that Costanz was involved in a narcotics conspiracy, indicated that Costanz used a mobile telephone and beeper to remain in contact with his co-conspirators and included Agent Dzialo's expert opinion that evidence would be located in a drug trafficker's residence. Also, since it is logical that records pertaining to mobile telephones and beepers would be located in one's residence, it cannot be said that the Government's actions were not objectively reasonable.

Hendrickson and Barnett challenge the District Court's refusal to submit a multiple conspiracy charge to the jury. The fact that Hendrickson was involved in an independent crack distribution network does not detract from the evidence of his earlier crack activities with Roberts nor his involvement as a heroin supplier to the Justine Roberts Organization. *See United States v. Maldonado-Rivera*, 922 F.2d 934, 963 (2d Cir. 1990) (it is not necessary that all conspirators' goals [were] not at cross-purposes") *cert. denied*, 111 S. Ct. 2811 (1991). Moreover, no prejudicial "spillover" evidence was introduced at trial because, in light of the fact that there was a central figure in the enterprise, namely Roberts, *see id.* (not necessary for conspirators to know the identities of other co-conspirators, especially where the activities of one person are central to the conspiracy), it is irrelevant that Hendrickson did not know the identities of other suppliers in the Justine Roberts Organization.

Barnett's assertion that his distribution of heroin to Roberts constituted a "separate network" is also meritless. Barnett knowingly played a role in a substantial organization that used several different narcotics sources. Nor do we accept Barnett's argument that he was not a

member of the charged conspiracy because he did not distribute crack cocaine as well as heroin. *See United States v. Barlin*, 686 F.2d 81, 89 (2d Cir. 1982) (more than one substance charged does not mean there are multiple conspiracies). In any event, he is unable to demonstrate prejudice from the absence of the multiple conspiracies charge.

Hendrickson and Barnett also contend that the District Court's conduct deprived them of a fair trial and the right to effective counsel based on the District Court's admonishment of defense counsel throughout the proceedings. Because certain of these incidents took place outside the presence of the jury, *see United States v. Roldan-Zapata*, 916 F.2d 795, 807 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1397 (1991), and other comments made in front of the jury were directed only at defense counsel's behavior, not the merits of the case, reversal is not mandated, *see United States v. DiTommaso*, 817 F.2d 201, 220 (2d Cir. 1987). Moreover, our conclusion that the defendants were not prejudiced by the District Court's comments is buttressed by the fact that the evidence of their guilt was overwhelming. *United States v. Boatner*, 478 F.2d 737, 742 (2d Cir.), *cert. denied*, 414 U.S. 848 (1973).

Hendrickson's claim that the District Court improperly instructed the jury regarding the count of possession with intent to distribute crack cocaine also lacks merit. During deliberations, the jury asked the District Court if it could consider evidence of Hendrickson's prior crack activity in deciding whether the substance seized on the date in question was considered Hendrickson's possession or distribution on earlier occasions, but it still must be convinced beyond a reasonable doubt that the substance seized on the date in question was crack. Since the District Court Properly instructed the jury on the burden

of proof, we find that the jury was properly charged on this point. *See United States v. Parker*, 903 F.2d 91, 101 (2d Cir.) (trial judge has to provide jury with sufficient instruction to enable it to assess evidence within proper legal framework and reach rational verdict), *cert. denied*, 498 U.S. 872 (1990).

Barnett also contends that the District Court erred in allowing the Government to play tapes obtained from his residence for defense witness Sabrina Shine during cross-examination. The Government played these tapes for the purpose of refreshing that purpose, since Shine answered all the questions put to her and did not indicate that her memory was faulty in any way. *See, e.g., Hall v. American Bakeries Co.*, 873 F.2d 1133, 1136 (8th Cir. 1989) (party must lay foundation that witness needs to refresh memory and that writing would be of assistance).

Nevertheless, Barnett did not object to the use of the tapes and their use was not plain error. *See* Fed. R. Crim. P. 52.

Barnett's challenge to the sufficiency of the evidence convicting him of firearms violations also lacks merit. 18 U.S.C. § 924(c)(1) only requires a showing that the weapon was an integral part of the predicate offense and facilitated the commission of that offense. *United States v. Meggett*, 875 F.2d 24, 29 (2d Cir.), *cert. denied*, 493 U.S. 858 (1989). Here, a shotgun was found in a bedroom in Barnett's residence, behind a headboard in which 1299 vials of crack cocaine were found. The location of the shotgun, coupled with the discovery of drug paraphernalias throughout the residence, clearly supported the jury's finding that Barnett used his residence as a base for his narcotics operation and intended to have the shotgun available for use if necessary. *See United States v.*

Alvarado, 882 F.2d 645, 653-54 (2d Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990) (proximity of guns to narcotics and cash allowed reasonable jury to infer the guns were there to protect the narcotics and money). The fact that the shotgun was unloaded does not require a different result. *United States v. Coburn*, 876 F.2d 372, 375 (5th Cir. 1989).

Barnett argues that he did not violate 18 U.S.C. § 922(g) because the shotgun had been transported in interstate commerce prior to this 1983 felony conviction. There is no requirement that the interstate movement must postdate the predicate felony conviction. It was sufficient for the Government to show that the shotgun had been transported in interstate commerce prior to the time that Barnett acquired possession of it. *See United States v. Sherbondy*, 865 F.2d 996, 999-1001 (9th Cir. 1988).

Finally, because Smith waived the right to appeal in her plea agreement with the Government, we affirm the sentence imposed by the District Court without reaching the merits of her claim. *See United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990) (knowing and voluntary waiver of the right to appeal a sentence does not violate due process), *cert. denied*, 112 S. Ct. 1488 (1992).

We have considered the remaining arguments of defendants-appellants and find them to be without merit.

S/ Roger J. Miner
HON. ROGER J. MINER,

S/ Frank X. Altimari
HON. FRANK X. ALTIMARI
Circuit Judges,

S/ John T. Elfvin
HON. JOHN T. ELFVIN,
District Judge.